



# Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department  
North Mall Office Building  
725 Summer Street NE, Suite A  
Salem, OR 97301-1271  
503-986-0900  
FAX 503-986-0904

February 19, 2015

VIA E-MAIL

CITY OF BEND  
ATTN: PATRICK GRIFFITHS  
62975 BOYD ACRES RD  
BEND, OR 97701

SUBJECT: Instream Water Right Transfer Application T-11000 – Mitigation Project (MP)-130

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve Transfer Application T-11000 – MP-130. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the Bend Bulletin newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the last date of newspaper publication.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at 503-986-0890 or [Sarah.A.Henderson@ wrd.state.or.us](mailto:Sarah.A.Henderson@ wrd.state.or.us) if I may be of assistance.

Sincerely,

*Sarah Henderson*

Transfer Specialist  
Transfer and Conservation Section

cc: Transfer Application file T-11000/MP-130  
Jeremy T. Giffin, District 11 Watermaster (via e-mail)  
Adam Sussman, Agent for the applicant (via e-mail)

encs

**BEFORE THE WATER RESOURCES DEPARTMENT  
OF THE  
STATE OF OREGON**

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-11000, and Mitigation	)	PROPOSING APPROVAL OF A
Project MP-130, Deschutes County	)	CHANGE IN PLACE OF USE AND
	)	CHARACTER OF USE AND
	)	PRELIMINARY AWARD OF
	)	MITIGATION CREDITS

**Authority**

Oregon Revised Statutes (ORS) 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. Oregon Administrative Rules (OAR) Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

OAR 690-521-0100 to 690-521-0600 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of establishing mitigation credits in the Deschutes Ground Water Study Area.

Pursuant to OAR 690-521-0400 (2), any mitigation credits awarded to a mitigation project are valid until used to fulfill a mitigation obligation of a ground water use in the Deschutes Ground Water Study Area. Valid mitigation credits may be assigned by any person or recognized mitigation bank to any person or other mitigation bank. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.

**Applicant**

CITY OF BEND  
ATTN: PATRICK GRIFFITHS  
62975 BOYD ACRES ROAD  
BEND, OR 97701

**Findings of Fact**

1. On December 31, 2009, PATRICK GRIFFITHS, WATER RESOURCES COORDINATOR FOR THE CITY OF BEND, filed an application to change the place of use and character of use under Certificate 75760 to instream use. The Department assigned the application number T-11000.
2. Notice of the application for transfer was published on January 12, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.

3. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Deschutes County, Jefferson County and the City of Bend Planning Division. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Transfer Application T-11000.
4. On September 2, 2014, the Department contacted the applicant's agent by e-mail correspondence to notify of a needed modification of the instream period and rate to be created by the transfer. On September 16, 2014, the applicant's agent concurred with the modification.
5. On October 22, 2014, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11000 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of November 21, 2014, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer after an extended deadline.
6. On February 18, 2015, the Department contacted the applicant's agent by e-mail correspondence to notify of an additional modification of the instream period and rate to be created by the transfer. On February 18, 2015, the applicant's agent concurred with the modification.
7. The portion of the right to be transferred is as follows:

**Certificate:** 75760 in the name of CLYDE W. PURCELL (confirmed by decree of the Circuit Court of the State of Oregon for Deschutes County, of record at Salem, in the Order Record of the Water Resources Director, in Volume 9, at Page 362)

**Use:** IRRIGATION of 13.0 ACRES

**Priority Date:** OCTOBER 10, 1903

**Rate:** 0.325 CUBIC FOOT PER SECOND (CFS)

**Limit/Duty:** The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 0.325 cubic foot per second.

**Source:** DESCHUTES RIVER, a tributary of COLUMBIA RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	12 E	WM	29	SW NE	1982 FEET SOUTH AND 1160 FEET EAST FROM THE NORTH 1/4 CORNER OF SECTION 29

**Authorized Place of Use:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
17 S	12 E	WM	20	SW SE	0.8
17 S	12 E	WM	29	NE NE	3.3
17 S	12 E	WM	29	NW NE	5.1
17 S	12 E	WM	29	NE NW	3.8

8. Certificate 75760 does not describe the duty of the right or the irrigation season. However information is available from the Deschutes River Decree (Circuit Court of the State of Oregon for Deschutes County; Volume 9, Page 453) indicating that the season is defined from April 1 to October 31 of each year. The Decree further limits the use to 1/40<sup>th</sup> CFS per acre (up to 0.325 CFS) from May 23 to August 20 and 1/80<sup>th</sup> CFS per acre (up to 0.163 CFS) during the rest of the irrigation season and a limitation of 4.0 Acre-Feet (AF) per acre per season.
9. A total of 52.0 AF of water may be beneficially used annually under the existing right.
10. Instream Transfer Application T-11000 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values; recreation; and pollution abatement. The application also proposes to establish mitigation credits in the Deschutes Ground Water Study Area.
11. Instream Transfer Application T-11000 proposes to change the place of use of the right to create an instream reach from the authorized POD (described in Finding of Fact No. 7) to Lake Billy Chinook (approximately River Mile (RM) 120).
12. The applicant originally proposed that the quantities water to be transferred instream be as protected follows:

Instream Period	Instream Rate (CFS)	Instream Volume (AF)
April 1 to October 31	0.325	137.95

13. The applicant has requested that any instream water right established as a result of this instream transfer be additive to existing instream water rights for the same reach established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). The applicant has also requested that any instream water rights established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with a more senior priority date.

***Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)***

14. Evidence was submitted with Instream Transfer Application T-11000 indicating that water had been used within the five years prior to submission of Instream Transfer Application T-11000 and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
15. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Instream Transfer Application T-11000.

16. The proposed instream rate and instream volume identified in Finding of Fact No. 12 are higher than the maximum rates and volume described in Findings of Fact No 8 and 9. Based upon Findings of Fact No. 8 and 9, and in consultation with the Watermaster and Oregon Department of Fish and Wildlife (ODFW), on September 16, 2014, the agent for the applicant requested to modify the quantities to be transferred and protected instream as follows:

**Instream Reach:** From the POD (as described in Finding of Fact No. 7) to Lake Billy Chinook (approximately RM 120)

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
October 10, 1903	0.163	52.0	April 15 through May 22
	0.120		May 23 through August 19
	0.163		August 20 through October 15

17. The proposed changes, as modified, would not result in enlargement of the right.
18. The proposed changes, as modified, would not result in injury to other water rights.
19. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
20. The protection of flows within the proposed reach is appropriate, considering:
- a) The instream water right begins at the recorded point of diversion;
  - b) The location of confluences with other streams downstream of the point of diversion;
  - c) There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - d) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
21. Within the proposed instream reach on the mainstem Deschutes River, there are several existing instream water rights. There are no instream water rights established under ORS 537.341 (state agency application process) and ORS 537.346 (minimum flow conversion). However, there is a pending instream water right application, IS-70695, filed by the ODFW pursuant to ORS 537.341, to establish an instream water right for anadromous and resident fish rearing from the Swalley Main Canal to Lake Billy Chinook, which if approved will have a priority date of September 19, 1990. The remaining instream water rights were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) and are generally located between the Swalley Main Canal and Lake Billy Chinook. These additional instream rights are generally for fish and wildlife habitat, recreation and pollution abatement.

22. This portion of the Deschutes River is also a designated State Scenic Waterway. The State Scenic Waterway designation provides for protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation, which is a matter of statutory policy. Flows for the designated Scenic Waterway are not always met during requested period for instream protection.
23. This segment of the Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams and a Total Maximum Daily Load (TMDL) study is underway.
24. The pending instream water right, proposed to be established under ORS 537.341 (state agency application process), within the proposed reach on the Deschutes River will be sufficient to protect the monthly quantities of water necessary for anadromous and resident fish rearing but will likely not always be met and will have a priority date junior in comparison to other water rights on the Deschutes River. By replacing a portion of any instream right created at the request of state agencies, the proposed instream right will provide protection for streamflows previously identified as necessary for fish and wildlife habitat under an earlier priority date.
25. By adding to other water rights, established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, a new instream water right established by this transfer would provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values, pollution abatement and recreation.
26. During the period April 15 to October 15, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes.
27. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

#### ***Preliminary Award of Deschutes Basin Mitigation Credits***

28. The City of Bend has requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. The applicant has requested that any mitigation credits generated from this project be assigned to the City of Bend.
29. The Department assigned this mitigation credit project number MP-130.
30. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on January 26, 2010. No comments were received in response to this notice.

31. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department, Oregon Department of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2) on January 11, 2010. No comments were received in response to this notice.
32. The proposed transfer of 13.00 acres to instream use will provide 23.4 acre-feet of mitigation water. Therefore, 23.4 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to the City of Bend. The mitigation credits may be used to mitigate for ground water permit applications and existing conditioned ground water permits and certificates, providing mitigation pursuant to the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505, within the General and Middle Deschutes Zones of Impact.
33. A total of 52.0 AF is proposed to be transferred to instream use and 23.4 AF of that, as identified above, may be used for mitigation purposes. The amount of water transferred instream and not used for mitigation purposes will benefit instream flow.
34. The Department shall award final mitigation credits upon completion of the approved project by the applicant and verification by the Department that the project is complete. The issuance of a certificate for the proposed instream water right shall result in completion of the project and verification that the project is complete.
35. Mitigation credits awarded to this mitigation credit project will be valid beginning the first calendar year that water will be protected instream under any new instream water right created as a result of this instream transfer application.

#### **Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in Instream Transfer Application T-11000 appear to be consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved.

This mitigation project appears to result in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

*If Instream Transfer Application T-11000 is approved, the final order will include the following:*

1. *The changes in character of use and place of use to instream use proposed in Instream Transfer Application T-11000 are approved.*
2. *Water right Certificate 75760 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer.*
3. *The instream water right shall provide for the protection of streamflows from the POD (as described in Finding of Fact No. 7) to Lake Billy Chinook (approximately RM 120).*

4. *The quantities of water to be protected under the instream water right are:*

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
October 10, 1903	0.163	52.0	April 15 through May 22
	0.120		May 23 through August 19
	0.163		August 20 through October 15

5. *Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.*
6. *Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion.*
7. *The instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.*
8. *The right to the use of the water is restricted to beneficial use at the place of use described, and is subject to all other conditions and limitations contained in Certificate 75760 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of this right.*
10. ***Preliminary Award of Mitigation Credits: Final Award of Mitigation Credits may be made upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of a new instream water right certificate, as described herein, will result in completion of the project and verification by the Department that the project is complete. If completed as proposed, mitigation credits, in the amount of 23.4 credits, as described herein, may be awarded to this mitigation project and assigned to the City of Bend. Mitigation credits awarded may be used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder in the **General and Middle Deschutes Zones of Impact**. Mitigation credits generated by this project will be available for use as mitigation beginning the first calendar year that water will be protected instream under a new instream water right***
11. *Mitigation credits are valid until used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder within the Deschutes Ground Water Study Area pursuant to the Deschutes Ground Water Mitigation Rules. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.*



12. *The instream certificate created as a result of the approval of this transfer shall be identified as a mitigation credit project for a ground water permit applicant and/or ground water permit/certificate holder. Within each instream certificate, the number of mitigation credits, the zone of impact in which the mitigation credits were generated and may be used, and the volume of water dedicated instream solely for instream benefits shall also be specified.*

Dated at Salem, Oregon this 19 day of February, 2015.



Dwight French, Water Right Services Division Administrator, for  
Thomas M. Byler, Director  
Oregon Water Resources Department

This Preliminary Determination was prepared by Sarah Henderson. If you have questions about the information in this document, you may reach me at 503-986-0890 or [Sarah.A.Henderson@wrds.state.or.us](mailto:Sarah.A.Henderson@wrds.state.or.us).

*Protests should be addressed to the attention of Water Rights Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.*